Shawal bin Hj Mohd Yassin v Public Prosecutor

HIGH COURT (JOHOR BAHRU) — CRIMINAL APPEAL NO 41–32 OF 2004(4)
AZAHAR MOHAMED JC
19 APRIL 2006

Criminal Procedure — Charge — Badly framed — Whether the charge framed against the appellant was defective — Charge disclosing no offence — Whether can be cured under Criminal Procedure Code ss 156 and 422

The appellant was charged pursuant to s 56(1A)(b) of the Immigration Act 1959/63 ('the said Act') and punishable under s 57 of the said Act for intentionally assisting an Indonesian citizen named Ali Mukhtar to board an air-craft bound for Surabaya, Indonesia without the said Ali Mukhtar going through Immigration checking. Ali Mukhtar had earlier pleaded guilty to s 30(2) and s 15(4) of the said Act. At the conclusion of the trial, the learned magistrate found that the prosecution had proved its case beyond a reasonable doubt against the appellant. In the event, the learned magistrate found the appellant guilty as charged. He was convicted and sentenced to two years imprisonment. Against that conviction and sentence he has now appealed. The primary issue which arises for determination in this appeal revolves around the question whether the charge framed against the appellant was defective. The question that arises is whether what the appellant was alleged to have done falls within the scope and ambit of s 56(1A)(b) of the said Act. The learned deputy public prosecutor also fairly and frankly admitted that the charge against Ali Mukhtar was defective. The learned deputy public prosecutor invited the court to uphold the conviction notwithstanding the defect in the charge. He argued that the defect was not fatal and did not amount to a failure of justice, referring to s 156 and s 422 of the Criminal Procedure Code ('the CPC').

Held, allowing the appeal:

(1) In the charge framed against the appellant there is no indication of the offence under the Act alleged to have been committed by Ali Mukhtar. Ali Mukhtar's conviction in respect of an offence under s 30(2) of the said Act was wrong in law. What then is the effect? The consequence is that, so far as the present case is concerned, the appellant had been charged and tried under a defective charge, as the charge framed did not disclose any offence under s 56 (1A)(b) of the said Act. The charge framed, and as it now stands, is one that is not in fact envisaged by that section (see para 9).

(2) Section 156 of the CPC has application only in a situation where there is an error either in stating the offence or the particulars required to be stated in the charge or there is an omission to state the offence or those particulars. In other

words that section provides for a cure should there be any non-compliance with the technical provisions of the law. That provision cannot be invoked in the case at hand in a situation where the charge was defective as disclosing no offence under the section of the Act. In the same way, the application of s 422 of the CPC is constrained to remedy no more than technical defects in the charge. Where a trial in the court below is conducted on the basis of a charge, which is defective as not disclosing an offence under the relevant section, it is an illegality which cannot be cured by s 422 (see para 12).

(3) The defect in the charge was a matter of substance and not merely of form. This was not a mere technical non-compliance of any provision of the law, which can be condoned as an irregularity. The appellant was left in a doubt as to the offence of which he had been convicted and sentenced. It is a fundamental principle of criminal law in our country that an accused person should know accurately of what offence he has been convicted and sentenced. The error in the charge did cause prejudice and injustice to the appellant (see para 13).

(4) Further on this point since the charge as worded did not disclose any offence it is now too late at the appellate stage to amend it so as to bring it within the provisions of the law (see C Mohammad v Public Prosecutor [1974] 1 MLJ 25). As the proceedings in the court below were a nullity, a retrial could not be ordered. Under the circumstances, the ends of justice do not require that the appellant should be put on trial again (see para 14).

[Bahasa Malaysia summary

Perayu dituduh di bawah s 56(1A)(b) Akta Imigresen 1959/63 (Akta tersebut) yang boleh dihukum dibawah s 57 Akta tersebut kerana dengan sengaja membantu seorang rakyat Indonesia bernama Ali Muhtar menaiki pesawat penerbangan ke Surabaya, Indonesia tanpa melalui pemeriksaan Imigresen. Ali Mukhtar telah pada awalnya mengaku bersalah terhadap tuduhan di bawah s 30(2) dan s 15(4) Akta tersebut. Selepas tamat perbicaraan, Majistret yang bijaksana telah mendapati pendakwa telah membuktikan kesnya melampaui keraguan munasabah terhadap perayu. Dalam pada itu, Majistret yang bijaksana telah mendapati perayu bersalah seperti yang dituduh. Perayu disabitkan kesalahannya dan dihukum penjara selama dua tahun. Perayu telah merayu ke mahkamah ini terhadap sabitan dan hukuman. Persoalan utama yang dibangkit untuk ditentukan dalam rayuan ini berputar atas soalan samada tuduhan yang dibentuk terhadap perayu adalah cacat. Persoalan yang bangkit ialah samada apa yang perayu dituduh jatuh di dalam skop dan lingkungan s 56(1A)(b) Akta tersebut. Timbalan Pendakwaraya yang dibijaksana secara adil dan terus terang mengaku bahawa tuduhan terhadap Ali Mukhtar adalah cacat. Timbalan Pendakwaraya yang dibijaksana mempelawa mahkamah ini untuk mengesahkan sabitan walaupun tuduhan itu cacat. Beliau menghujahkan bahawa kecacatan sedemikian bukannya memudaratkan dan tidak menimbulkan kegagalan keadilan, dengan merujuk kepada s 156 dan s 422 Kanun Acara Jenayah (Kanun tersebut).

Diputuskan, membenarkan rayuan tersebut:

(1) In the charge framed against the appellant there is no indication of the offence under the Act alleged to have been committed by Ali Mukhtar. Ali Mukhtar's conviction in respect of an offence under s 30(2) of the said Act was wrong in law. What then is the effect? The consequence is that, so far as the present case is concerned, the appellant had been charged and tried under a defective charge, as the charge framed did not disclose any offence under s 56 (1A)(b) of the said Act. The charge framed, and as it now stands, is one that is not in fact envisaged by that section (lihat perenggan 9).

(2) Seksyen 156 Kanun tersebut hanya terpakai dalam situasi dimana terdapat kesilapan samada dalam menyatakan tuduhan atau butir-butir yang terpaksa dinyatakan di dalam tuduhan atau dimana terdapat satu kegagalan dalam menyatakan tuduhan ataupun butir-butir tersebut. Dalam perkataan lain, seksyen tersebut memberikan satu pembetulan jika terdapatnya sebarang ketidakpatuhan peruntukan-peruntukan undang-undang secara teknikal. Peruntukan tersebut tidak dapat digunakan dalam kes ini di satu situasi dimana tuduhan yang cacat seperti yang tidak membentangkan satu kesalahan di bawah seksyen Akta tersebut. Seperti juga pemakaian s 422 adalah tersekat iaitu untuk membetulkan tidak lebih daripada kecacatan teknikal pada tuduhan. Dimana satu perbicaraan di mahkamah bawahan dijalankan atas tuduhan yang cacat dimana ia tidak mendedahkan satu kesalahan di bawah seksyen yang relevan, ia adalah satu kesalahan undang-undang dan tidak boleh diperbetulkan oleh s 422 (lihat perenggan 12).

(3) Kecacatan pada tuduhan adalah dari segi substantif dan bukan hanya bentuk. Ini bukannya hanya satu ketidakpatuhan teknikal sebarang peruntukan undang-undang, yang dapat diterima sebagai satu luar aturan. Perayu ditinggalkan dalam keraguan atas kesalahan yang disabitkan dan dihukumkan. Kesilapan dalam tuduhan telah menyebabkan prejudis dan ketidakadilan kepada perayu (lihat perenggan 13).

(4) Lanjutan dalam perkara ini oleh kerana tuduhan seperti yang dinyatakan tidak mendedahkan sebarang kesalahan, ia adalah terlalu lewat ditahap rayuan ini untuk memindanya untuk membawanya di dalam peruntukan-peruntukan undang-undang (lihat C Mohammad v Public Prosecutor [1974] 1 MLJ 25). Oleh kerana prosiding di mahkamah bawahan adalah terbatal, satu perbicaraan semula tidak dapat diperintahkan. Dalam keadaan ini, demi keadilan perayu tidak perlu untuk dibicarakan sekali lagi (lihat perenggan 14).]

Notes

For cases on badly framed charge, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1010–1040.

Cases referred to

Chong Chee Pak v Public Prosecutor [1948–49] Supp MLJ 45 (refd)
C Mohammad v Public Prosecutor [1974] 1 MLJ 25 (refd)
Lee Swee Tee v Public Prosecutor [1960] MLJ 161 (refd)
LIm Beh & Ors v Opium Emperor [1842] 3 ky 110 (refd)
Msimanga Lesaly v PP [2005] 4 MLJ 314 (refd)

Quek Ching Kim v Reg [1956] MLJ 54 (refd)

Legislation referred to

Common Gaming House Enactment s 4(i)(c)
Criminal Procedure Code ss 152, 153, 154, 156, 422
Immigration Act 1959/63 ss 15(4), 30(2), (1), 56(1A)(b)

Abdul Hamid Menon Abdullah (Nordin Darus with him) (RK Menon) for the appellant.
Ian Sheng Kuan Chou Chuen (Deputy Public Prosecutor) for the respondent.

Azahar bin Mohamad JC:

[1] The appellant, Shawal bin Hj Mohd Yassin who was at the material time a police personnel attached to the Special Branch of the Police Force at Sultan Ismail Airport Senai in Johore Baliru, was charged in the Magistrate's Court, Johor Bahru with the following offence:

> Bahawa kamu pada 21 September 1996 jam lebih kurang 11.00 pagi hingga jam 12.30 tengahari, di Lapangan Terbang Sultan Ismail, Senai, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, didapati telah dengan sengaja membantu seorang rakyat Indonesia bernama Ali Muhtar 4 menaiki pesawat penerbangan ke Surabaya, Indonesia, tanpa melalui pemeriksaan Imigresen. Oleh itu, kamu telah melakukan kesalahan di bawah s 56 (1A)(b) Akta Imigresen 1959/63 dan boleh dihukum di bawah s 57 dalam Akta yang sama.

[2] The appellant had claimed trial to the charge. At the conclusion of the trial, the learned magistrate found that the prosecution had proved its case beyond a reasonable doubt against the appellant. In the event, the learned magistrate found the appellant guilty as charged. He was convicted and sentenced to two years imprisonment. Against that conviction and sentence he has now appealed. The learned magistrate had granted a stay of execution pending the outcome of this appeal.

[3] Before me, the conviction was attacked on a number of grounds. Even though En Abdul Hamid Menon Abdullah, learned counsel for the appellant has thirthy seven grounds in his petition of appeal, I think the critical and primary issue, which arises for determination in this appeal revolves around the question whether the charge framed against the appellant was defective. In this regard, the relevant grounds in the petition reads as follows:

(1) Tuan Majistret telah menyalahi undang-undang dan fakta manakala beliau memutushan bahawa tuduhan yang dikemukakan terhadap perayu tiada cacat. Sebenarnya tuduhan itu mengandungi satu kesalahan yang tidak dikenali oleh undang-undang (contains and offence not known to the law). Ini merupakan satu 'serious misdirection in law'.

(2) Tuan Majistret telah menyalahi undang-undang dan fakta manakala beliau gagal melihat dan memahami dan mengambil kira bahawa seksyen

undang-undang yang terlibat dan digunakan oleh pendakwaan merupakaan satu seksyen yang boleh ditafsirkan sebagai sangat teknikal. Ini juga telah menjadi 'serious misdirection in law'.

(3) Tuan Majistret telah menyalahi undang-undang dan fakta manakala beliau telah gagal untuk menolak 'reject' satu tuduhan seperti yang dikemukakan oleh pendakwaan.

[4] As has been set out above, it is to be noticed that in essence the charge framed against the appellant alleged as follows:

(a) that on 21 September 1996 at about 11 am until 12.30pm at the Sultan Ismail Airport, Senai in Johor Baru, in Johor;

(b) the accused intentionally assisted an Indonesian citizen named Ali Mukhtar;

(c) board an air-craft bound for Surabaya, Indonesia;

(d) without the said Alt Mukhtar going through immigration checking.

[5] And so, the question that arises is whether what the appellant was alleged to have done falls within the scope and ambit of s 56 (1A)(b) of the Immigration Act 1959/63 (the Act). For convenience, I reproduce hereunder the relevant parts of that section which reads as follows:

(IA) Any person who —

(b) does any act preparatory to or in furtherance of the commission of any offence under this Act;

shall be guilty of such offence and be liable to the punishment provided for such offence.

[6] It is to be noticed that the word 'or' in the section is in fact a disjunctive word. That section is to be construed in this way. It creates two offences. Firstly, doing any act preparatory to the commission of any offence under this Act. And secondly, doing any act in furtherance of the commission of any offence under this Act. In both the offences, there is no dispute that the phrase, 'the commission of any offence under this Act', constitutes a key element which is essential to complete the offence under s 56 (lA)(b) of the Act and its omission would render the charge defective. It is a fundamental principle of administration of criminal justice in our country that an accused person must be informed at the very early stage exactly what is the charge, which he is called upon to answer. In point of law, the charge must state with sufficient clearness and certainty that which the prosecution seeks to prove against an accused person. In considering this matter I have kept in the forefront of my mind the principle of law that an accused person can be convicted only after it has been established beyond a reasonable doubt of the particular offence as stipulated under the law. In the present case it is necessary, first and foremost, to bear in mind that looking at the charge, it is to be noticed at once that there is evidently no indication of the offence alleged to have been committed by Ali Mukhtar under the Act. On this issue, so far as is relevant to the issue in point, to bring home the charge against the appellant it was incumbent upon the prosecution in the court below to establish the offence under the Act committed by Ali Mukhtar. In this respect, En Ian Sheng

Kuan, the learned deputy has drawn to my attention exh P 9, which is the charge sheet in respect of Johor Baru magistrate's court 'A' No 83-1882-96, that is to say, the charges framed against Ali Mukhtar. The charges were in the following terms:

> PERTUDUHAN PERTAMA
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> Bahawa kamu pada 21 September 1996 jam lebih kurang 12.30 tengahari di dalam pesawat Sistem Penerbangan Malaysia MH 845, di Lapangan Terbang Sultan Ismail, Senai, dalam daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, didapati tanpa sebab yang munasabah telah mengelakkan diri dari pemeriksaan imigresen untuk keluar dari Malaysia ke Indonesia. Oleh itu kamu telah melakukan satu kesalahan di bawah s 30(2) Akta Imigresen 1959/63 dan boleh dihukum di bawah s 57 dalam Akta yang sama.
>
> PERTUDUHAN KEDUA
>
> Bahawa kamu pada 21 September 1996 jam lebih kurang 12.30 tengahari di Lapangan Terbang Sultan Ismail, Senai, dalam daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, didapati tanpa sebab yang munasabah telah didapati tinggal lebih masa di negara ini selama satu tahun tiga bulan dan lima belas hari setelah Pas Lawatan Sosial yang dikeluarkan kepada kamu tamat pada 6 Jun 1995. Oleh itu kamu telah melakukan satu kesalahan di bawah s 15(4) Akta Imigresen 1959/63 dan boleh dihukum di bawah s 57 dalam Akta yang sama

[7] Ali Mukhtar had pleaded guilty to both the charges and he was sentenced to eight months imprisonment in respect of the first charge and seven months imprisonment in respect of the second charge. In this regard, it is the first charge, which is relevant to the present case, and in this connection s 30 of the Act says this:

> (1) An immigration officer may give such instructions as may be reasonably necessary to ensure that no passenger or member of a crew evades examination either of his person or effects.
>
> (2) Any person who without reasonable excuse refuses or fails to comply with any instruction given under subsection (1) shall be guilty of an offence against this Act.

[8] This section is very clear and direct. Section 30(1) empowers an immigration officer to give instructions to prevent evasion of examination. Then comes s 30(2). It says that any person who without reasonable excuses or fails to comply with the instructions given shall be guilty of an offence against this Act. The wordings of the provision are clear and unequivocal. The wordings must be construed from the language employed. They mean exactly what they say. And it is settled law that it is the general principles of construction of statutes that penal legislations are to be construed strictly. As a result, under that section due proof is required of the instructions given by the immigration officers. Quite clearly, the main ingredient of such an offence is the instructions given by the immigration officer. This brings me again to the first charge framed against Ali Mukhtar. Now, according to the charge he was said to have committed an offence under s 30 (2) of the Act for the reason that without reasonable excuse he evaded immigration examination of his person. The point is this. There is obviously no indication in the charge of the instructions given by the immigration officers. What Ali Mukhtar was alleged to have done was the act of evading immigration examination. However, there is no such offence under

s 30(2) of the Act. Furthermore, upon looking at the written facts exhibited in the appeal record it is clear that the facts of the case do not support the charge under that section. As I have emphasized earlier, to make up the offence intended by the legislature under that section the charge must state the instructions given by the immigration officers and due proof is required. The learned deputy rightly conceded that the first charge omitted to specify the instructions. The learned deputy also fairly and frankly admitted that the charge was defective. I must say that I have no hesitation in saying that Ali Mukhtar's conviction was wrong in law for all the reasons given.

[9] At this juncture, two points should be highlighted. The first is that in the charge framed against the appellant there is no indication of the offence under the Act alleged to have been committed by Ali Mukhtar. The second is that Ali Mukhtar's conviction in respect of an offence under s 30(2) of the Act was wrong in law. What then is the effect? In my judgment the consequence is that, so far as the present case is concerned, the appellant had been charged and tried under a defective charge, as the charge framed did not disclose any offence under s 56(lA)(b) of the Act. The charge framed and as it now stands is one that is not in fact envisaged by that section.

[10] I now move on to consider the consequence of this defect on the proceedings in the court below and of the conviction of the appellant. The learned deputy invited me to uphold the conviction notwithstanding the defect in the charge. He argued that the defect was not fatal and did not amount to a failure of justice. He referred to s 156 and s 422 of the Criminal Procedure Code (the CPC). He has drawn to my attention the case of *Msimanga Lesaly v PP* [2005] 4 MLJ 314, Now, s 156 reads as follows:

> No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state of offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by such error or omission

[11] While, s 422 states as follows:

> Subject to the provisions contained in this chapter no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on account of:
>
> (a) of any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this code; or
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence, or unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[12] With respect, I am unable to accede to the argument of the learned deputy. In my view s 156 has application only in a situation where there is an error either in stating the offence or the particulars required to be stated in the charge or there is an

omission to state the offence or those particulars. In other words that section provides for a cure should there be any non-compliance with the technical provisions of the law. I do not think that provision can be invoked in the case at hand in a situation where the charge was defective as disclosing no offence under the section of the Act. I do not consider that this is an irregularity curable under s 156. In the same way, the application of s 422 is constrained to remedy no more than technical defects in the charge. To me where a trial in the court below is conducted on the basis of a charge which is defective as not disclosing an offence under the relevant section, it is an illegality which cannot be cured by s 422. I should point out that the case of *Msimanga Lesaly v PP* [2005] 4 MLJ 314 relied on by the learned deputy is distinguishable on its facts. There, the appellant submitted that the charge against her, as amended after the conclusion of the case for the prosecution, was defective as it still contained the allegation that the offence was committed by two persons in furtherance of a common intention; it was argued that the amended charge should have stated that the drugs were being trafficked solely by the appellant. The Court of Appeal rejected this argument. The court said that although the amendments failed to completely cleanse the original charge of all references to the appellant having committed the offence together with the co-accused in further of a common intention, yet this did not make the amended charge bad. The court further said that the minor defects in the charge did not mislead or prejudice the appellant at all. In stark contrast to that case, in the case before me it was not a minor defect; the charge was defective as disclosing no offence in law.

[13] The defect in the charge was a matter of substance and not merely of form. This was not a mere technical non-compliance of any provision of the law which can be condoned as an irregularity. I do not think it can be cured without causing injustice to the appellant. In my view, this was not a defect, disregarding it would not occasion a miscarriage of justice. To me the charge as framed did not disclose any offence and therefore I have no doubt that the defect of this kind was an illegality. I think the appellant was left in doubt as to the offence of which he had been convicted and sentenced. It is a fundamental principle of criminal law in our country that an accused person should know accurately of what offence he has been convicted and sentenced. In my judgment the error in the charge did cause prejudice and injustice to the appellant. In the end, I have no hesitation in saying that the charge framed against the appellant was bad in law. When looked in this way, one can see that there has been a substantial miscarriage of justice. As a consequence, the conviction in this case was a nullity. With respect I would follow Callow J in *Chong Chee Pak v Public Prosecutor* [1948-49] Supp MLJ 45. There, the accused was convicted on a charge of 'assisting in the management of a public lottery.' On appeal it was argued that the decision was wrong in law in that the appellant was found guilty on a charge which did not disclose an offence known to law. It was held that since there was no such offence under s 4(i)(c) of the Common Gaming House Enactment as 'assisting in the management of s 12 public lottery', therefore the conviction was a nullity. A similar view was expressed by Whyatt CJ in *Quek Ching Kim v Reg* [1956] MLJ 54 and Rigby J in *Lee Swee Tee v Public Prosecutor* [1960] MLJ 161. In my judgment, the learned magistrate in the present case had failed to direct his attention to that important consideration. There is thus a serious misdirection by way of non-direction, which had occasioned a failure of justice. The learned

magistrate had therefore erred in law and fact, in that he found the appellant guilty of a charge which did not disclose any offence.

[14] Further on this point since the charge as worded did not disclose any offence it is now too late at the appellate stage to amend it so as to bring it within the provisions of the law. In this context the authority that I would like to cite is the case of C Mohammad v Public Prosecutor [1974] 1 MLJ 25. There, the appellant had been convicted on a charge of failing to affix labels or tags indicating the grades and prices of textiles. It was argued that the charge on which 'the accused was convicted was defective as there was no order under the Price Control Ordinance requiring retailers to affix tags or labels to any goods or classes of goods. It was held that as the charge was defective the conviction must be quashed. Syed Agil Barakbah J. (as he then was) had this to say, and I respectfully agree with him, at page 26 of the report;

> A question arises as to whether the table on which the said articles were placed can be termed as 'container' within the context of s 13 of the Act. It is not necessary for me to labour on this interpretation because the main question that arises now is whether an amendment to the charge can be made at this stage, assuming that I agree with the submission of the learned deputy Public Prosecutor. In this connection I hold that it is too late since the charge in the court below as framed disclosed no offence known to law. (See *Tan Cheng Kooi & Anor v Public Prosecutor*). Failure to affix any labels or tags on any goods or classes of goods which are displayed in the retailer's premises to which the public has access is not an offence because there has not been any order published in the Gazette making it an offence under s 13(1) of the Act. I say it is too late because the provisions of the Criminal Procedure Code require that before a charge can be amended such amendment should be read and explained to the accused who should then be called upon the plead to the charge as amended and be accorded the right to recall any prosecution witness for cross-examination. (See *Lee Swee Tee v Public Prosecutor*). Since the charge does not disclose any offence known to law, it is not necessary nor desirable for me to consider the provisions of the Criminal Procedure Code as urged by the learned deputy Public Prosecutor because there is an apparent miscarriage of justice.

[15] While on this issue, I would like to emphasize on the correct and proper procedure in framing charges. It is important to bear in mind that the purpose of ss 152, 153 and 154 of the CPC is clearly to enable the accused person to know the matter with which he is accused of at the very early stage. If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged and may be prepared to answer the charge as he best may (see *Lim Beh & Ors v Opium Emperor* [1842] 3 ky 110). In this regard, magistrates and prosecutors should also always remember the advice and practical guidance of Thompson J in *PP v Leong Yoon Meow* [1953] MLJ xxxvi. I think it is imperative that I repeat here in extenso what His Lordship said as follows:

> It is a very good working rule for magistrates and police officers to hold that where what an accused person is alleged to have done cannot be described in the language of any statutory provision creating an offence or where it seems necessary to depart from the language of the section in framing a charge, then the probability is that no offence has been committed. For the common offences the forms of charge are well known and there is little room for error but in the case of the less common offence the prosecuting officer should in every case ask himself: 'Can the facts which I think I can prove against the accused be described in the

words of the section under which I am proposing to prosecute him?' If the answer to that question is "No " then he should accept it that a prosecution is very unlikely to succeed and he should take legal advice before proceeding further. As far as the Magistrate is concerned, he should scrutinize every charge brought before him and compare it with the wording of the section under which it is brought. If it does not set out all the ingredients of the alleged offence as described in the section he should refuse to proceed further with it, and if it cannot be amended so as to bring it in accordance with the section it should be dismissed.

[16] With that I return to the present case and there is one matter of importance that I must touch upon. I have to consider whether a retrial should be ordered. In this regard, *Mallal's Criminal Procedure (5th Ed) at para 10476* commented:

A new trial would mean the case is reopened and the accused is retried on all the charges originally framed. A retrial would probably be ordered in cases where it is in the interests of justice to order one. The appellate court has a wide discretion. Generally a new trial will be ordered where although there was actually a case to answer, the case was rejected. A retrial may also be ordered when there is a misdirection as to the onus of proof, or when the trial judge has prevented the prosecution from adducing all the evidence it has desired to. Sometimes even though there is a fault in the decision of the lower court the appellate court may be able to do justice without ordering a new trial

Generally a retrial cannot be obtained on the ground that new evidence is produced unless it is shown that such evidence could not have been produced at the first trial since otherwise there would be no finality to the litigation. A retrial will not be ordered where the prosecution has through its fault failed to present its case properly. Indeed a retrial cannot be ordered where to do so would give the prosecution a second chance to make good the inadequacy of their evidence. A retrial will also serve no purpose where the conviction is against the weight of the evidence. In such a case the appropriate step for the appellate court to take is to quash the conviction and set aside the sentence.

[17] In this case I lay emphasis on the fact that in the first place Ali Mukhtar's conviction was wrong in law and illegal since the charge was bad in law, as it disclosed no offence. What is more, as the proceedings in the court below were a nullity, a retrial could not be ordered. Under the circumstances, it is my judgment the ends of justice do not require that the appellant should be put on trial again. Again, with respect I would follow Callow J in *Chong Chee Pak's case* where His Lordship said at p 47

Nor can I order re-trial, for the charge in the court below being one without the law, it follows that the proceedings were a nullity, and while the re-trial of a trial may in appropriate circumstance be ordered, the re-trial of a nullity is an impossibility.

[18] In the result, for the reasons already given, the appeal by the appellant is allowed. I rule that the proceedings in the court below were a nullity. The consequent conviction was undoubtedly a nullity. The conviction and sentence must accordingly be quashed. There will be no order of retrial.

Appeal allowed

Reported by Sally Kee